

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Republic Industries, Inc.	)	Docket No. CAA-IV-45-01
	)	
Respondent	)	

Order Granting in Part and Denying in Part Motion for Partial  
Accelerated Decision

The EPA's complaint in this case has been issued under the Clean Air Act, section 113(d), 42 U.S.C. 7413(d), and charges Respondent, Republic Industries, Inc., with violations of the National Emission Standards for Asbestos under the National Emission Standards for Hazardous Air Pollutants, 40 C.F.R Part 61, Subpart M . A penalty of \$48,000, is sought.

The violations alleged are in three counts. Counts I and III charge Respondent with removing and bagging regulated asbestos-containing material and failing while doing so to adequately wet asbestos-containing material ("ACM") as required by 40 C.F.R. 61.145(c)(6)(i). Count II charges Respondent with failing to label containers into which it had put asbestos-containing waste material ("ACWM") with the name of the waste generator and the location at which the waste was generated as required by 40 C.F.R. 61.150(a)(1)(v).

Respondent denied the violations. The parties submitted their respective prehearing exchanges, and complainant now moves for a partial accelerated decision on Respondent's liability for the

violations charged. Complainant asserts that Respondent's answer, the information filed in the prehearing exchanges, and the affidavit submitted with its motion establish that there is no genuine issue of material fact over Respondent's liability.

Respondent does not deny the removal and bagging of regulated asbestos-containing material as alleged in the complaint. As to Counts I and III, however, Respondent contends that the ACM was adequately wetted within the meaning of the regulations. As to Count II, Respondent admits that the bags containing ACWM were not properly labeled when first placed on the truck to be transported off the site, but that they were properly labeled before they were actually transported off the site.

Complainant has submitted the affidavit of Caroline Robinson in support of its motion who states as follows:

First, Ms. Robinson alleges that in the course of a compliance inspection on August 13, 1991, she removed seven bags of ACWM from a truck at Paris Island, S. C., which had been removed and bagged by Respondent in connection with a renovation operation Respondent was doing for the Department of the Navy. Two of the bags visibly contained moisture and were heavier than the remaining five, where there appeared to be no moisture. The lighter weight of the five bags and the lack of appearance of moisture were both evidence that the ACM had not been adequately wetted.

Second, Ms. Robinson alleges that none of the seven bags were labeled with the generator's name and the location where the waste was generated.

Third, Ms. Robinson states that on August 20, 1991, she made a compliance inspection at the Inbordan Elementary School in Enfield, North Carolina, where Respondent was also engaged in a renovation operation. There, she inspected four bags from several bags on the floor near the entrance to the work area. There was no moisture visually present in these bags and upon opening them the material in all four bags visually appeared to be dry. The surface of the material was also dry to the touch and dry powdery material was also observed at the site.

Respondent in opposition submitted affidavits of four of its employees who were present at the two inspections. Mr. Terry Gore, who supervised the two renovation projects, and Mr. Tim Brooks who was engaged in the removal and bagging of the asbestos, states that the ACM was wetted before and during the removal process and that the material was also sprayed with a wetting agent before and during the time it was being bagged. Care was taken not to break any of the pieces as they were removed so as not to expose any dry asbestos fibers. When any pieces were broken water was sprayed on the exposed material to keep it wet until the bags were sealed. The material, however, contained an exterior water repellent coating and this fact and the fact that some of the pieces may have been broken by Ms. Robinson on her inspection so as to reveal a dry surface, accounted for Ms. Robinson's observation that the material had not been adequately wetted.

Mr. Wayne Gannious and Mr. Herman Murphy were involved in the removal at the Inbordan School site. Mr. Gannious avers that the

ACM had been sufficiently wetted to prevent the release of particulates. Mr. Herman Murphy also disputes Ms. Robinson's statement that there were no visible signs of water in the bags she observed at the site. Mr. Murphy states that there were visible signs of moisture on the interior of the bag and that he did not see any powdery material on the surface of the material, in the bag or in the bottom of the bag.

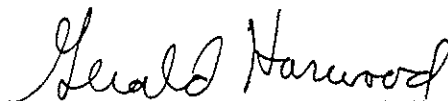
The affidavits clearly show that there is a genuine issue of fact as to whether the ACM was adequately wetted within the meaning of the regulations. The motion for an accelerated decision on liability with respect to Counts I and III of the complaint are denied.

As to the failure to properly label, as alleged in Count II, Respondent does not deny that the bags on the truck were not labeled at the time of the EPA's inspection of the Paris Island facility. Respondent argues, however, that the bags were labeled prior to being transported off the site. According to Respondent, this is all the regulation requires.

The labeling requirement of 40 C.F.R. 61.150(a)(5), applies to all ACWM that is "to be transported off the facility site." It is not disputed that the bags of ACWM loaded on the truck were to be transported off the site. Respondent does not claim that its practice was to label the bags after they were loaded on the truck. Indeed, such a claim would lack credibility, first, because the pictures of the loaded bags submitted with complainant's prehearing exchange show the impracticality of such a procedure and, second,

because Respondent does not dispute the statement of Mr. Gore, who supervised the removal of the asbestos, contained in the EPA's inspection report and repeated in Ms. Robinson's affidavit, that he was not aware of any labeling requirement. In sum, the undisputed evidence shows that at the time of the inspection unlabeled bags of ACWM had been loaded on the truck for transport off the site and no intervening steps were to be taken prior to transport off the site to label the containers. These facts clearly establish noncompliance with the requirement that "material to be transported off the site" be properly labeled. Accordingly, Complainant's motion for an accelerated decision finding Respondent liable for not complying with the labeling requirement of 40 C.F.R. 61.150(a)(v), is granted. The fact that Respondent labeled the bags after the lack of the labeling was pointed out to it, is not a defense to the violation but goes only to the question of whether this justifies a mitigation of the penalty.

For the reasons stated above, Complainant's motion for an accelerated decision on liability is denied as to Counts I and III, and granted as to Count II.



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Gerald Harwood  
Senior Administrative Law Judge

Dated: May 11, 1993

In the Matter of Republic Industries, Inc., Respondent  
Docket No. CAA-IV-45-01

Certificate of Service

I certify that the foregoing Order Granting in Part and Denying in Part Motion for Partial Accelerated Decision, dated May 11, 1993, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Julia P. Mooney  
Regional Hearing Clerk  
U.S. EPA  
345 Courtland Street, N.E.  
Atlanta, GA 30365

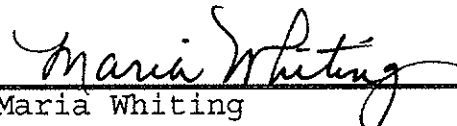
Copy by Regular Mail to:

Attorney for Complainant:

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Maria Whiting  
Secretary

Dated: May 11, 1993